No. 11,917

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE H. RICHARDSON,
Appellant,

vs.

THE TRAVELERS INSURANCE COMPANY,
Appellee.

APPELLANT'S ANSWERING BRIEF

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We are not unmindful of the settled rule that where the trier of fact makes findings upon conflicting evidence, no question, on that issue, is presented to an appellate court. However the large number of reversals, on appeal of lower court judgments, attests convincingly to the non-infallibility of trial court findings.

Where, as here, a case is tried and findings made, adverse to the appellant, who feels, in his own mind nevertheless, that an injustice has been done to him, and the trial court has "found" facts which he believes are incorrect, his only recourse, in view of the rule just stated, is to urge what technical objections exist, in order to obtain the simple justice which he feels is his due. Appellant sincerely claims that his testimony as given in the lower court (particularly R. 119) was true, correct and pertinent in all respects—that there was no mistake in the issuance of the policy as originally written, and that the policy as issued, was in exact accordance with the previous conversations and understanding he had with Mr. Glendenin and Mr. Hensley, appellee's then (1926) assistant managers (R. 120) and that the policy is the same one he discussed, thought he applied and paid premiums for, and that the lower court's judgment gives him only one-half the amount he believes he paid for and should now receive.

Appellee is incorrect in assuming that appellant refrained from arguing the findings because he accepted these findings as true and conclusive of the actual facts. We refrained from arguing them in our opening brief, and limiting our argument before this court to the technical questions involved, solely because of the rule stated above.

We think most of the argument contained in appellee's brief, is already answered by our opening brief, and we shall refrain from belaboring the Court with further and repetitious argument along similar lines. However, we do wish to make a few observations of so-called "new matter" (not previously stressed) contained in appellee's brief.

ANSWERING APPELLEE'S CONTENTIONS

It would appear to us that appellee's argument regarding the general subject of laches and statutes of limitations and repose, could better be addressed to the Legislature, as an argument against any type of statute of limitations.

In speaking of such statutes, the late Chief Justice Angelotti, of the California Supreme Court, in *Dibble v. Reliance Life Ins. Co.,* 170 Cal. 199, quoting from *Wright v. Mutual Benefit Assn.,* 118 N.Y. 237, 16 Am. St. Rep. 749, 6 L.R.A. 731, 23 N.E. 186 said (of our California C.C.P. Sec. 338):

> "It is in the nature of and serves a similar purpose as statutes of limitations and repose, *the wisdom of which is apparent to all reasonable minds.*" (Italics ours)

It is axiomatic and elementary that the findings of a trier of fact, are no better than the evidence upon which they are based, and that findings made contrary to the admitted and obvious facts, cannot stand; e.g., suppose, for instance, that a trial court was to make findings that a certain well known Japanese was a white person of the Caucasian race but when the case was heard on appeal, the person concerned was personally present in the appellate court, and a casual glance would at once establish the inaccuracy of the lower court's findings. Findings made under such circumstances, no matter in what legal or judicial verbiage cached, cannot possibly stand. The cases in this court on this elementary point are legion. Appellant feels the present findings come within this category.

The Supreme Court of Pennsylvania in *Kaufman v. New York Life Ins. Co.,* 315 Pa. 34, 172 Atl. 306, beginning at page 307, distinguishes *Columbia Natl. Life Ins. Co. v. Black,* 35 Fed.(2d) 571 (C.C.A. 10th) and most of the other cases cited by appellee in his brief, from cases similar to the case at bar, in our opinion. Besides, in none of the cases cited by appellee, including *Columbia Natl. Life Ins. Co. v. Black,* supra, were the policies delivered into the hands of the insurer company in connection with policy loans. This fact alone, we submit, is enough to distinguish *Columbia Natl. Life Ins. Co. v. Black,* supra, from the instant case.

THE INCONTESTABLE CLAUSE

Appellee's statement on page 22 of his brief, that we originally, in the trial court, abandoned our defense of the incontestable clause, is grossly inaccurate. The whole record of the proceedings in the court below is now before this court, and nowhere does this appear. We positively did not abandon that defense then, and we do not abandon it now.

Appellee says he has no quarrel with the cases cited by us, particularly, *Dibble v. Reliance Life Ins. Co.,* supra. The law is too well settled to now admit of a quarrel. But it is significant to observe that largely the same arguments then being made against the incontestable clause regarding procuring the policy by fraud, are now being advanced by appellee herein against the incontestable clause in this suit for reformation.

We again respectfully submit that it cannot be held that the incontestable clause in the present policy does not

apply in this present "reformation" suit, without outraging and doing violence to the plain and unequivocal language of the incontestable clause in the policy; and we submit that no amount of legal verbiage could ever convince the "man in the street"—the average policyholder—who buys life insurance—that a suit by the company to "reform" the policy 20 years later, and pay only one-half the amount clearly stated in the policy, is not a "contest" of the policy which he supposed he was protected against by the incontestable clause in his policy.

Appellee complains in his brief (page 13) and says that appellant is guilty of "inequitable conduct" because he had the temerity to resist and defend appellee's present action to reform the insurance contract 20 years after its issuance—and pay appellant only one-half the amount clearly stated in his policy.

To this outrageous and un-American claim we can only refer to the language of Judge Bourquin in *In re Siem,* 284 Fed. 868, 872, where in speaking of an absurd defense the court said:

> "* * * savors much of the tyrant's bitter complaint that his victims refused to die quietly, and disturbed his sleep with their indecent wails of agony."

THE CALIFORNIA STATUTE APPLIES

Without regard to the other reasons assigned in our opening brief as to why this case should be reversed—all of which points we still feel are good, and urge—we think one point above all is unanswerable, namely:

Appellee on page 10 of his brief, appears to recognize the applicability of the California statute of limitations (C.C.P. Sec. 338, Subd. 4) and claims in avoidance, that

"* * * appellant has completely overlooked the italicized portion of the law hereinabove referred to * * *". The italicized portion of the statute referred to reads *"The cause of action is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the mistake."* (Italics ours)

This phase of the case is now clear, and in view of the settled law on the subject, we submit, requires a reversal on this point alone, for the following reasons:

First: It is the settled law in California, and elsewhere, that "Means of knowledge, is the equivalent of knowledge." In *Lady Washington Con. Co. v. Wood,* 113 Cal. 482, the California Supreme Court at page 487, said:

> "* * * as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on inquiry which, if followed would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of the facts. These principles are so fully recognized that mere reference to some of the cases in which they have been enforced will be sufficient. (Martin v. Smith, 1 Dill. 85; Wood v. Carpenter, 101 U.S. 135; Hecht v. Slaney, 72 Cal. 363; Moore v. Boyd, 74 Cal. 167; Lataillade v. Orena, 91 Cal. 565; 25 Am. St. Rep. 219)".

This rule has been consistently followed since. See *Bathke v. Rahn,* 46 Cal. App.(2d) 694-696. It is also followed in other jurisdictions. In *Malone Motor Co. v. Green,* 213 Ala. 635, 105 So. 897, the Supreme Court of Alabama at page 898 said:

> "The means of knowledge is the equivalent of knowledge, and whatever is sufficient to put one on inquiry is sufficient to charge him with notice of everything to which the inquiry would lead."

Second: We think it requires little argument to show that on each of the four occasions when the appellee had the policy back at its home office in Hartford, Conn., for a month at a time, in connection with the policy loans, it then had the "*means of knowledge*" and information, sufficient to put it upon inquiry and which if followed (such as merely reading the upper half of the same page on which appellee admittedly read the policy loan values) would certainly have led to the "discovery" of the now lately claimed error—but which in any event, is sufficient to charge it with notice of the exact terms of the policy—which terms remained in the policy at all times since its issuance in 1926 down to the present time.

Third: The appellee then, having had legal knowledge of the exact terms of the policy, as early as 1928 (first loan) and as late as 1936 (last loan) and not having seen fit to take action to commence the present suit until August, 1946, over 10 years later, now brings the present action squarely within the California statute of limitations (C.C.P. Sec. 338), including the "italicized portions" thereof.

Fourth: Appellee's argument that its loan department had no "connection" with its policy writing department, or its other departments, we submit, is so ridiculous, absurd and downright silly, as to fall by its own weight. Indeed, perchance, if such a dangerous doctrine were to become the law, there would soon be no sanctity of con-

tracts and little responsibility under any sort of contract which would soon lead to open repudiation of most contracts including insurance policies. If such were the law, all an insurer would have to do to repudiate its policy would be to claim that its policy writing department had nothing to do with its sales department. Absurd? Surely; but no more absurd than appellee's present contention and "explanation" of why it didn't read the policy on any one of the four occasions it had the policy, not only in its home office in Hartford, Conn., but also when the policy passed through its San Francisco branch office.

It is again respectfully submitted that, for the reasons assigned, this case should be reversed and judgment entered for appellant for the full amount clearly and unequivocally stated in his policy.

Respectfully submitted,

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Dated: San Francisco, Calif.,
Nov. 5, 1948.